FILED
NOV 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-580

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LOUIS and JACQUELINE H. TUCKER,
h/w and CHRISTINA TUCKER,
by her parents and guardians,
LOUIS and JACQUELINE H. TUCKER,
Petitioners,

v.

WHITAKER TRAVEL, LTD.,
ATKINSON & MULLIN TRAVEL, INC.,
R.M. TOURS a/k/a RICHARD MOSS TOURS, LTD.,
HAPPY TRAILS STABLES,
COMMONWEALTH OF THE BAHAMAS
and the MINISTRY OF TOURISM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS COMMONWEALTH OF THE BAHAMAS AND THE MINISTRY OF TOURISM

WILLIAM A. BRADFORD, JR.*
D. LEA BROWNING
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4660
Attorneys for Respondents Commonwealth of The Bahamas and the Ministry of Tourism

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

21pp

QUESTIONS PRESENTED

1. Whether the Third Circuit was correct when it ruled—in agreement with each of the other circuits previously presented with the same question—that the first clause of § 1605(a)(2) of the Foreign Sovereign Immunities Act requires that there be a nexus between a plaintiff's claim and a foreign sovereign's commercial activities in the United States before a United States court may exercise jurisdiction over the foreign sovereign.

2. Whether the Third Circuit correctly ruled that there was no jurisdiction under clause 3 of § 1605(a)(2) of the Foreign Sovereign Immunities Act because the acts upon which petitioners base their claims were not connected to any commercial activities of the Commonwealth of The Bahamas or the Ministry of Tourism and those acts caused no direct effect in the United States.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
(a) Statement of Facts	1
(b) Course of Proceedings	2
REASONS FOR DENYING THE WRIT	5
1. There Is No Conflict Among the Circuits	6
2. The Circuits Do Not Distinguish Between Corporations and Individuals When Determining Jurisdiction Under the FSIA	9
3. The Case Is Not Cert-Worthy	13
CONCLUSION	14

TABLE OF AUTHORITIES

CASES Page

Australian Government Aircraft Factories v. R. C. Lynne, 743 F.2d 672 (9th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) 12
Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984) 12
Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985) 6, 9, 10, 11
Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979) 13
Castillo v. Shipping Corp. of India, 606 F. Supp. 497 (S.D.N.Y. 1985) 6
Close v. American Airlines, Inc., 587 F. Supp. 1062 (S.D.N.Y. 1984) 12
Gemini Shipping, Inc. v. Foreign Trade Org. for Chemicals and Foodstuffs, 647 F.2d 317 (2d Cir. 1981) 9
Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982) 9
Grass v. Credito Mexicano, S.A., 797 F.2d 220 (5th Cir. 1986) 11
Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344 (11th Cir. 1982) 11
Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979) 6, 12
In Re Disaster at Riyadh Airport, 16 Av. Cas. (CCH) 17,880 (D.D.C. 1981) 6
Keller v. Transportes Aereos Militares Ecuadorianos, 601 F. Supp. 787 (D.D.C. 1985) 12
Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983) 10, 13
Meadows v. Dominican Republic, 628 F. Supp. 599 (N.D. Cal. 1986) 11
Ohntrup v. Firearms Center, Inc., 516 F. Supp. 1281 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985) 12
Riedel v. Bancam, S.A., 792 F.2d 587 (6th Cir. 1986) 11

TABLE OF AUTHORITIES—Continued

Page

Schmidt v. Polish People's Republic, 579 F. Supp. 23 (S.D.N.Y.), *aff'd*, 742 F.2d 67 (2d Cir. 1984) .. 12
Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) 9, 11
Tigchon v. Island of Jamaica, 591 F. Supp. 765 (W.D. Mich. 1984) 6
Transamerican Steamship Corp. v. Somali Democratic Republic, 767 F.2d 998 (D.C. Cir. 1985) 10, 11
Tuck v. Pan American Health Org., 668 F.2d 547 (D.C. Cir. 1981) 9
Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979) 12
Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982) 11
Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195 (5th Cir. 1984) 6, 8, 9
Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 13
Wyle v. Bank Melli of Tehran, Iran, 577 F. Supp. 1148 (N.D. Cal. 1983) 12
Yugoexport, Inc. v. Thai Airways Int'l, Ltd., 749 F.2d 1373 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2326 (1985) 9
Zernicek v. Petroleos Mexicanos, 614 F. Supp. 407 (S.D. Tex. 1985) 12

STATUTES

28 U.S.C. § 1441(d) 2
28 U.S.C. § 1446 2
28 U.S.C. § 1605(a)(2) ..... *passim*
28 U.S.C. § 1605(a)(3) 7

OTHER AUTHORITIES

H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604 ..... 7, 10, 13

TABLE OF AUTHORITIES—Continued

Page

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) 8

Restatement (Second) of Foreign Relations Law § 18(b)(ii)-(iii) (1965) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-580

LOUIS and JACQUELINE H. TUCKER,
h/w and CHRISTINA TUCKER,
by her parents and guardians,
LOUIS and JACQUELINE H. TUCKER,
Petitioners,

v.

WHITAKER TRAVEL, LTD.,
ATKINSON & MULLIN TRAVEL, INC.,
R.M. TOURS a/k/a RICHARD MOSS TOURS, LTD.,
HAPPY TRAILS STABLES,
COMMONWEALTH OF THE BAHAMAS
and the MINISTRY OF TOURISM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS COMMONWEALTH OF THE BAHAMAS AND THE MINISTRY OF TOURISM

STATEMENT OF THE CASE

(a) Statement of Facts

Petitioners Jacqueline and Christina Tucker contacted defendant Whitaker Travel, Ltd., a privately owned travel agency in Pennsylvania, in response to a news-

paper advertisement by Apple Tours promoting one of their tours to the Commonwealth of The Bahamas ("The Bahamas"). Through defendant Whitaker Travel, Ltd., petitioners bought an Apple Tour to The Bahamas, which another privately owned travel agency in Pennsylvania, Atkinson & Mullin Travel, Inc., was to provide.

After arriving at the Ambassador Beach Hotel in The Bahamas, petitioners received an advertising leaflet from defendant Happy Trails Stables, a privately owned and operated stable in The Bahamas. Petitioners contracted directly with defendant Happy Trails Stables for horseback rides, during the course of which petitioners fell from their horses and sustained injuries.

The only connection that respondents The Bahamas and the Ministry of Tourism have to this case is that, since 1980, the Ministry of Tourism has in the United States advertised tourism, including sports activities, in The Bahamas.

(b) Course of Proceedings

Petitioners Louis and Jacqueline Tucker and their daughter, Christina Tucker, filed their first Complaint in the Court of Common Pleas of Philadelphia County against Whitaker Travel, Ltd., Atkinson & Mullin Travel, Inc., R. M. Tours, Happy Trails Stables, The Bahamas, and the Ministry of Tourism. Petitioners subsequently refiled the same Complaint in the Court of Common Pleas of Philadelphia County, but this time named as defendants only The Bahamas and the Ministry of Tourism.

The foreign state defendants The Bahamas and the Ministry of Tourism removed both cases to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1441(d) and 1446.

On October 25, 1985, the District Court for the Eastern District of Pennsylvania granted defendants The Bahamas and the Ministry of Tourism's Motion to Dismiss for lack of personal and subject matter jurisdiction

on the grounds of sovereign immunity and for failure to state a claim upon which relief could be granted. The district court also denied plaintiffs' Motion to Remand the claims against the foreign state defendants to the Philadelphia County Court. Having dismissed the foreign state defendants, the district court then remanded all remaining defendants to the Philadelphia Court of Common Pleas. The district court's opinion is reported at 620 F. Supp. 578 and is reproduced as Appendix C to the Petition for Writ of Certiorari (hereinafter Pet. App. C).

On appeal, in a unanimous opinion, the Third Circuit affirmed the district court's holding that it had no personal or subject matter jurisdiction over the foreign state defendants The Bahamas and the Ministry of Tourism.[1] The Third Circuit noted that the Foreign Sovereign Immunities Act of 1976 ("FSIA")[2] provides a foreign state immunity from suit in the United States unless the claim falls within one of the statutory exceptions. Pet. App. B-2. Thus, according to the court of appeals, there could be no subject matter jurisdiction over The Bahamas or the Ministry of Tourism unless plaintiffs' claim satisfies one of the three exceptions enumerated in § 1605(a)(2), which provides:

> [clause 1] the action is based upon a commercial activity carried on in the United States by the foreign state; or [clause 2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [clause 3] upon an act outside the territory of the United States in connection with a commercial activity of the for-

---

[1] The Third Circuit's Opinion is unreported and is reproduced as Appendix B to the Petition for Writ of Certiorari (hereinafter Pet. App. B).

[2] Pub. L. 94-583, 90 Stat. 2891, *codified at* 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), and 1602-1611.

> eign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

The Third Circuit noted that The Bahamas and the Ministry of Tourism had stipulated that they were engaged in commercial activity in the United States, *i.e.*, the promotion of tourism. Pet. App. B-3. However, this alone was insufficient to bring plaintiffs' claim within § 1605(a)(2). Instead, the Third Circuit ruled that in order for clause 1 of § 1605(a)(2) to be applicable, "there must be a nexus between the plaintiffs' grievance and the sovereign's commercial activity in the United States." Pet. App. B-3. The Third Circuit affirmed the district court's holding that the relationship between plaintiffs' claim (that their injuries were caused by the negligence of certain employees of a privately owned and operated stable in The Bahamas) and The Bahamas and the Ministry of Tourism's advertisements in the United States is "too attenuated to satisfy the requirements that the claim be 'based upon' the foreign state defendants' commercial activity in the United States." Pet. App. B-3.

The Third Circuit also held that "[p]atently, the allegations of the complaints do not satisfy the requirement of clause 2 that the action be based upon 'an act performed in the United States.'" Pet. App. B-3.

The Third Circuit likewise held inapplicable clause 3 of § 1605(a)(2), whereby a foreign state loses its immunity if the claim is "based upon" an act outside the United States "in connection with" a foreign state's commercial activity elsewhere and that act causes a "direct effect" in the United States. According to the court, the acts upon which plaintiffs based their claim were "in no way connected to the foreign state defendants' commercial activity." Pet. App. B-3 - B-4. In addition, the court held that "causing injury to an American citizen abroad does not cause a direct effect in the United States despite

the fact that the injury continues to cause suffering." Pet. App. B-4.

Furthermore, the Third Circuit ruled that the plaintiffs had no cognizable claim against The Bahamas and the Ministry of Tourism. The court rejected plaintiffs' argument that The Bahamas and the Ministry of Tourism's decisions whether and how to regulate tourism, police the activities of its citizens, and investigate accidents within its borders are commercial activities. Instead, the court held that "these are 'peculiarly governmental' activities," for which The Bahamas and the Ministry of Tourism would retain their sovereign immunity. Pet. App. B-4. In addition, the court affirmed the district court's holding that as for plaintiffs' claims for negligent misrepresentation, breach of warranty, or duty to warn, "the facts alleged failed to state a claim upon which relief could be granted." Pet. App. B-3 n.1.

On July 11, 1986, the Third Circuit denied the Tuckers' petition for a rehearing *en banc*. The Tuckers now petition this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

There are at least three reasons why this Court should not grant certiorari in this case. First, not only is there no conflict among the circuits as to how clause 1 of § 1605 (a) (2) of the FSIA is to be interpreted, there is no likelihood this Court would uphold petitioners' interpretation because it would require this Court to rewrite § 1605 (a) (2) to conflict with its legislative history. Second, petitioners are simply wrong that the circuits, when determining whether jurisdiction may be exercised over a foreign sovereign under clause 3 of § 1605 (a) (2) of the FSIA, distinguish between whether the claimant is a corporation or a natural person. Finally, the case is not worthy of certiorari. Even if a United States court were to exercise jurisdiction, petitioners have no claim

against The Bahamas and the Ministry of Tourism on which they could prevail.

1. There Is No Conflict Among the Circuits.

This Court should deny the writ of certiorari because not only is there no conflict among the circuits as to the interpretation of clause 1 of § 1605(a)(2) of the FSIA, no circuit has ever adopted petitioners' intrepretation of § 1605(a)(2). In fact, numerous courts have specifically rejected petitioners' "doing business" test. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1110 n.8 (5th Cir. 1985); *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 202 (5th Cir. 1984); *Castillo v. Shipping Corp. of India*, 606 F. Supp. 497, 502 (S.D.N.Y. 1985); *Tigchon v. Island of Jamaica*, 591 F. Supp. 765, 767 (W.D. Mich. 1984); *In Re Disaster at Riyadh Airport*, 16 Av. Cas. (CCH) 17,880 (D.D.C. 1981); *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1057, 1059-60 (E.D.N.Y. 1979). In addition, petitioners seek to have this Court adopt a test which would rewrite the first clause of § 1605(a)(2) merely because their claim fails to satisfy that section as Congress drafted it.

Under the first clause of § 1605(a)(2), there is no subject matter or personal jurisdiction over a foreign sovereign unless:

> the action is *based upon* a commercial activity carried on in the United States by the foreign state * * * *.

§ 1605(a)(2) (emphasis added). Thus, before jurisdiction may be exercised over a foreign sovereign under clause 1 of § 1605(a)(2), not only must the foreign sovereign "carry on" commercial activity in the United States, but the plaintiff's claim must also be "based upon" that commercial activity. However, petitioners argue that under clause 1 of § 1605(a)(2), a United States court will have subject matter jurisdiction merely if the foreign state is "doing business" in the United States or

if its commercial activities have "substantial contact" with the United States. Petitioners' interpretation would satisfy § 1605(a)(2)'s requirement that the foreign state "carry on" commercial activity in the United States, but it would totally eliminate the "based upon" requirement of § 1605(a)(2).

In addition, that Congress did not intend to adopt a "doing business" test in § 1605(a)(2) is clearly evidenced by the legislative history of the FSIA.[3] The Section-by-Section analysis states that § 1605 "requires some connection between the lawsuit and the United States." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6612. It also reiterates the "based upon" standard of § 1605(a)(2) by stating:

> Section 1605(a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a *claim based upon a commercial activity*.

House Report, *supra*, at 18, *reprinted* at 6617 (emphasis added).

Moreover, if this Court were to adopt petitioners' interpretation of § 1605(a)(2) (*i.e.*, that a foreign sovereign is subject to the jurisdiction of the United States courts solely because it does business in the United States), every foreign government that advertises in the United States would become an insurer of the safety of each American tourist who visits its country. This would clearly flout Congressional intent, for Congress in adopting the FSIA did not intend to "open the floodgates" to the United States courts for any controversy around the world an American may have with a foreign sovereign.

---

[3] Had Congress wanted to adopt a "doing business" test in § 1605(a)(2) it surely could have, for it did so in the expropriation claims provision in § 1605(a)(3). *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6618.

See Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d at 202. As Bruno A. Ristau, Chief of the Foreign Litigation Section of the Civil Division of the Justice Department, stated:

> It should also be stressed that the long-arm feature of the bill [FSIA] will insure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small "international courts of claims." The bill is not designed to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 31 (1976) (statement of Bruno A. Ristau).

Therefore, in order to satisfy the "based upon" requirement of the first clause of § 1605(a)(2), the Third Circuit was correct to rule that "there must be a nexus between the plaintiffs' grievance and the sovereign's commercial activity in the United States." Pet. App. B-3. In so ruling, the lower court followed the plain language of the first clause of § 1605(a)(2) as well as the legislative history of the FSIA.

Furthermore, the decision of the court of appeals construing § 1605(a)(2) does not conflict with that of any other circuit. Petitioners' contention that the circuit courts have adopted conflicting tests to interpret the phrase "based upon" in the first clause of § 1605(a)(2) is simply inaccurate. Moreover, no circuit has held, as petitioners would have this Court do, that a United States court may exercise jurisdiction over a foreign state defendant under § 1605(a)(2) of the FSIA merely because it does business in the United States.

Instead, every circuit court which has previously construed the "based upon" requirement of the first clause of § 1605(a)(2) has either expressly adopted or cited to the Third Circuit's "nexus" test or has adopted a test differing in semantics only. *See Callejo v. Bancomer, S.A.*, 764 F.2d at 1110 n.8; *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d at 202; *Tuck v. Pan American Health Org.*, 668 F.2d 547, 550 n.6 (D.C. Cir. 1981); *Gemini Shipping, Inc. v. Foreign Trade Org. for Chemicals and Foodstuffs*, 647 F.2d 317, 319 (2d Cir. 1981); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *cf. Yugoexport, Inc. v. Thai Airlines Int'l, Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2326 (1985); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982).

2. The Circuits Do Not Distinguish Between Corporations and Individuals When Determining Jurisdiction Under the FSIA.

This Court should deny the writ because the Third Circuit and other federal courts are not—contrary to petitioners' assertions—treating the claims of natural persons any differently than those of corporations when determining whether jurisdiction over a foreign state may be exercised under clause 3 of § 1605(a)(2) of the FSIA. In order for there to be subject matter jurisdiction over a foreign sovereign under clause 3 of § 1605(a)(2), the cause of action must be based:

> upon an act outside the territory of the United States *in connection with* a commercial activity of the foreign state elsewhere and that act causes a *direct effect* in the United States * * * *.

§ 1605(a)(2) (emphasis added).

Remarkably, petitioners discuss two circuit court opinions which construe clause 3 of § 1605(a)(2) and then

state "but other Circuit Courts have not directed their sights on the Clause Three 'direct effect' problem." Pet. at 20. They thus ignore *nine* other circuit court opinions directly on point, as well as numerous district court opinions. Had petitioners looked at the whole body of case law, they would have realized that the federal courts are not determining the scope of jurisdiction under clause 3 of § 1605(a)(2) based upon whether the claimant is a natural person or a corporation.

Instead, the courts have uniformly focused, consistent with the language of clause 3 of § 1605(a)(2) and its legislative history, on whether the act causes a "direct effect in the United States" irrespective of the status of the claimant. The legislative history of § 1605(a)(2) specifies that "direct effect" should be interpreted by reference to Section 18 of the Restatement (Second) of Foreign Relations Law of the United States (1965). *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6618. That section governs how American law may be applied to conduct outside of the United States and states that the conduct must have a "substantial" effect in the United States that is "a direct and foreseeable result of the conduct outside the territory" of the United States. Restatement (Second) of Foreign Relations Law § 18(b)(ii)-(iii) (1965); *Callejo v. Bancomer, S.A.*, 764 F.2d at 1111; *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1004 (D.C. Cir. 1985); *Maritime International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).[4]

---

[4] Of course, in determining whether the effects are both "substantial" and "direct and foreseeable," it is obvious that the question is not whether there were *any* effects in the United States. For example, in Callejo v. Bancomer, S.A., 764 F.2d at 1112, the Fifth Circuit noted that because the individual depositors were located in the United States, the effects were "inevitably" felt there. That was not the end of the court's analysis, however. The

Applying this rule in suits brought by both individuals and corporations for either financial loss or personal injury, the federal courts uniformly have found jurisdiction over a foreign state defendant under clause 3 of § 1605(a)(2) when an act of the foreign state outside of the United States, in connection with a commercial activity of the foreign state elsewhere, caused a "direct effect" in the United States. *See Grass v. Credito Mexicano, S.A.*, 797 F.2d 220, 221-22 (5th Cir. 1986); *Riedel v. Bancam, S.A.*, 792 F.2d 587, 591-92 (6th Cir. 1986) (Sixth Circuit found "direct effect" in United States in suit brought by individual depositors for violation of Ohio securities laws); *Callejo v. Bancomer, S.A.*, 764 F.2d at 1110-12 (under clause 3 of § 1605(a)(2), Fifth Circuit found "direct effect" in suit brought by individuals against a foreign state defendant alleging a breach of contract concerning certificates of deposits); *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d at 1003-04 (in suit brought by American shipping corporation, District of Columbia Circuit found that the "effects of the [foreign state] Agency's detention of the [American] ship and demand for payment in the United States were both direct and substantial within the meaning of the FSIA"); *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1351 (11th Cir. 1982); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 n.13 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 829 (1982) (Third Circuit found the requisite "direct effect" under clause 3 of § 1605(a)(2) in suit brought by individual seamen based on a breach of employment contracts); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d at 311-13; *see also Meadows v.*

---

court also added that the effects in the United States were foreseeable. The foreign state defendants had engaged in a regular course of business conduct with the individual claimants for several years. In addition, the effects in the United States were not fortuitous, as in those cases where the person injured abroad happens to be an American. *Id.*

Dominican Republic, 628 F. Supp. 599, 604-05 (N.D. Cal. 1986) (court found "direct effect" in suit brought by individual American businessmen for breach of contract to recover commissions due for services performed); *Schmidt v. Polish People's Republic*, 579 F. Supp. 23, 27 (S.D.N.Y.), *aff'd*, 742 F.2d 67 (2d Cir. 1984); *Wyle v. Bank Melli of Tehran, Iran*, 577 F. Supp. 1148, 1157-58 (N.D. Cal. 1983); *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281, 1286-87 (E.D. Pa. 1981) (in personal injury suit brought by American individuals, court found "direct effect" in United States where plaintiffs' injuries in the United States were both "substantial and foreseeable consequence" of foreign state defendant's actions), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985).

However, the courts also uniformly hold that when an individual American is injured overseas or an American corporation's property is damaged or destroyed overseas, there is no jurisdiction under clause 3 of § 1605(a)(2) over a suit brought either by the American corporation or the individual because the effects in the United States are not "direct and foreseeable"; at best they are secondary or indirect effects of the injuries that occurred overseas and are not sufficient to meet the "direct effect" requirement in § 1605(a)(2). *See Australian Government Aircraft Factories v. R. C. Lynne*, 743 F.2d 672, 675 (9th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) (direct effect of foreign state defendant's misconduct was destruction of corporation's property in Indonesia; any financial loss by the corporation in the United States, including cost of replacement, was indirect consequence); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984); *Keller v. Transportes Aereos Militares Ecuadorianos*, 601 F. Supp. 787, 789-790 (D.D.C. 1985); *Zernicek v. Petroleos Mexicanos*, 614 F. Supp. 407, 412-413 (S.D. Tex. 1985); *Close v. American Airlines, Inc.*, 587 F. Supp. 1062, 1064-66 (S.D.N.Y. 1984); *Harris v. VAO Intourist, Moscow*, 481 F. Supp. at 1061-65; *Upton v. Empire of Iran*, 459 F.

Supp. 264, 266 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979); *cf. Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d at 1111; *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979).

Based on this well-established and consistent body of case law, the Third Circuit correctly found that petitioners' claim failed to satisfy the "direct effect" requirement in clause 3 of § 1605(a)(2). Pet. App. B-3–B-4. Even if the court of appeals had ruled otherwise, petitioners' claim still would not have satisfied clause 3 of § 1605(a)(2). In addition to requiring a "direct effect" in the United States, that section requires that petitioners' claim be based upon a foreign state's act "in connection with" its commercial activity. However, as both lower courts held, the acts upon which petitioners base their claims are in no way connected to The Bahamas and the Ministry of Tourism's commercial activities either in the United States or elsewhere. Pet. App. B-4; Pet. App. C-11.

3. The Case Is Not Cert-Worthy.

Even if this Court were inclined to reconsider the scope of jurisdiction under the FSIA,[5] this is not the appropriate case. Both of the lower courts have already held that petitioners have no cognizable claim against The Bahamas and the Ministry of Tourism over which a United States court could exercise jurisdiction. In one claim, petitioners seek to hold The Bahamas and the Ministry of Tourism liable for a number of alleged governmental or regulatory acts or omissions. However, the FSIA codified the long established policy in the United States that foreign states are absolutely immune for acts "which are sovereign or governmental in nature." *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14, *reprinted in* 1976 U.S. Code Cong. &

---

[5] *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

Ad. News at 6613. Therefore, as the lower courts correctly concluded, the Bahamian government's decisions on whether or how to regulate tourism, including horseback riding, investigate accidents within its borders, and to police its own citizens are not commercial activities but rather "peculiarly governmental" activities that are immune from the jurisdiction of the United States courts. Pet. App. B-4; Pet. App. C-7.

As for petitioners' claims for negligent misrepresentation, breach of warranty, or duty to warn, both the District Court and the Third Circuit have held that the facts alleged failed to state a claim for which relief could be granted. Pet. App. B-3 n.1; Pet. App. C-9 - C-11.

CONCLUSION

For all of the foregoing reasons, Judges Aldisert, Garth and Sloviter correctly upheld the District Court for the Eastern District of Pennsylvania's decision in this case. Their opinion is in accord with the plain terms of the FSIA, its legislative history, and the decisions of the other circuits. This fact, combined with the fact that petitioners have no cognizable claim against The Bahamas and the Ministry of Tourism, renders this petition one that this Court may, and should, readily deny.

Respectfully submitted,

WILLIAM A. BRADFORD, JR.*
D. LEA BROWNING
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4660
Attorneys for Respondents Commonwealth of The Bahamas and the Ministry of Tourism

* Counsel of Record